Supreme Court, U.S.
FILED
MAY 5 2003
CLERK

(3)

No. 02-1333

In the
Supreme Court of the United States

GEFFREY WAXMAN AND GAIL WAXMAN, AS PARENT AND NATURAL GUARDIAN OF RICHARD WAXMAN, A MINOR AND RICHARD WAXMAN,
Petitioners,

v.

ROSLYN UNION FREE SCHOOL DISTRICT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS, ALBANY

PETITIONERS' REPLY BRIEF

ALAN E. WOLIN
Counsel of Record

WOLIN & WOLIN
420 JERICHO TURNPIKE
SUITE 215
JERICHO, NY 11753
(516) 938-1199

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

10 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. THE COURT HAS JURISDICTION TO ENTERTAIN THIS MATTER 1

II. RESPONDENT'S FACTUAL BACKGROUND IS INCORRECT 2

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza Inc., 391 U.S. 308 (1968) 1

Gotthilf v. Sills, 375 U.S. 79 (1963) 2

Honig v. Doe, 484 U.S. 305 (1988) 6

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 1

Statutes:

28 U.S.C. §1257 1

I

THE COURT HAS JURISDICTION TO ENTERTAIN THIS MATTER

In its Brief in Opposition to the Petition for Writ of Certiorari, Respondent asserts that this Court lacks jurisdiction, under 28 U.S.C. §1257, to entertain this matter. Petitioners respectfully disagree.

This Court, in the past, has reviewed injunctions under the circumstances herein presented. For example, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the Court held that it had power to decide a case, which had been labeled "temporary" by the State courts. In doing so, the Court noted that there was no indication that the temporary injunction rested on disputed questions of fact which might be resolved differently upon further hearing. The Court continued that the issuance of a permanent injunction, under those circumstances, would be little more than a formality.

The same rationale applies herein. The New York court granted a temporary injunction after an evidentiary hearing. As a result of the evidentiary hearing, the New York court made findings of fact. It cannot be expected that the New York court would, in any way, alter its determination upon further proceedings.

This Court held similarly in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza Inc.*, 391 U.S. 308 (1968). In that case, this Court agreed to review the matter where a State court order, as herein, granted an injunction and provided that it would remain in effect until further modification. This Court held that the injunction

would be deemed final because there was no indication that any modification would be forthcoming at any time in the near future.

Again, this rationale applies herein. There are no current proceedings pending in the New York courts with reference to any request to make the injunction "permanent." There is also no likelihood that the New York court will alter its decision at any time in the near future. In fact, Richard has now been suspended from school since November 15, 2000. This should constitute permanency.

It should also be noted that, although the New York Court of Appeals dismissed the Motion for Leave to Appeal, the Appellate Division of the New York State Supreme Court denied the prior application for leave to appeal to the New York Court of Appeals. This factor is also important in determining whether the State Court's order was final. *See, Gotthilf v. Sills*, 375 U.S. 79 (1963).

Petitioners, therefore, respectfully request that, contrary to Respondent's claim, this Court consider the matter to be a final judgment of the New York State courts and accept jurisdiction to review this Petition.

II

RESPONDENT'S FACTUAL BACKGROUND IS INCORRECT

Petitioners hereby rebut Respondent's recitation of the factual background of this case. In order to submit a student to Special Education, the student must have a classified disability which significantly affects his/her learning. The facts herein prove otherwise.

Three (3) different psychologists and one (1) psychiatrist opined that Richard has no disability. Respondent offered no expert witness to support its belief. Respondent is in possession of all these reports, which show that Richard scored highly academically and psychologically and has no disabilities that would classify him for Special Education. They also show that Richard is a youngster that would benefit from the socialization that school offers.

Every teacher rated Richard academically satisfactory or above. This is in the official testimony of his teachers at both the impartial hearing and the evidentiary hearing. It is also evident in his report cards. Richard has been recommended for Honors classes in High School in most of his subjects, including Honors Math, Honors Science, Honors History and Honors English.

There is no classification in Special Education for discipline problems. The legislature has not funded Special Education programs for students with disciplinary problems.

Five days prior to the Impartial Hearing, petitioners, pursuant to IDEA law, requested, through their lawyer, copies of all evidence that Respondent intended to use. The key evidence was a typewritten anecdotal written by Richard's fifth grade teacher. All of the Respondent's witnesses read testimony from this anecdotal and the Impartial Hearing Officer allowed them to use this anecdotal as the basis for the Special Education referral. Numerous times, petitioners' lawyer objected to this as improper, but the Impartial Hearing Officer overruled the objections. Approximately one (1) year later, petitioners were advised, in writing, that the original handwritten anecdotal was destroyed by Respondent. Respondent destroyed the original handwritten anecdotal prior to the hearing before the Impartial Hearing Officer. Instead,

Respondent manufactured a typewritten version and used this version as evidence against Richard. In fact, much of this version was untrue, but was accepted over Petitioners' objections.

It is not routine for any School District to enjoin a child. It has never been the case that a 10 year old child be enjoined from school because their parents objected to the School District's conducting psychological testing. Quite contrary, most School Districts accept expert opinions from a child's doctor.

It is not routine for Respondent to ban a child from school, strip him of his right to attend school and suspend him indefinitely. Richard has now been suspended from school since November 15, 2000. This should constitute permanency.

The testimony at the hearing supported Petitioners' claim that Richard is not a danger to himself or others. For example, Perri Peters, the History teacher, testified that Richard had not hurt himself or another to her knowledge. Robin Milgrim, another teacher, testified that Richard had never hit anyone to her knowledge. Liza Mancia, another teacher, testified similarly. She indicated that she had never observed Richard hit anyone in her class. Theresa Arcarola, the Science teacher, also testified that she never observed Richard hit anyone, never saw spit coming out of his mouth and never believed that Richard was trying to hurt himself. Mrs. Murphy, a teacher's aide, testified similarly.

Dr. Cohen testified that, in his opinion, Richard is not a danger to himself or others.

Mr. Ingegno, a Teaching Assistant, testified that the first time that Richard had detention was October 27, 2000, the date of the first suspension. In that suspension, Richard was accused of tapping students and teacher with a soft file folder. The school did not allow Richard's father to speak to the teacher involved. Richard was also accused of slamming into a glass door. If he slammed into a glass door, why did it not break? Why did Richard not hurt himself. He accidently chose a closed door, one of the four were open and Richard chose the wrong one. In any event, Commissioner Mills, the highest School Administrator in the State of New York, expunged the suspension from the record. Still, Respondent uses expunged records and submits them as fact. By law, expunged records must be stricken from the record and not used against Richard in any way.

Mr. Ingegno also testified that he grabbed Richard from behind and pulled his arms apart while another school aide, Mr. Lobelia, crushed the can in Richard's hand. In New York State Education Law, this is a form of corporal punishment that school personnel are not allowed to do. Being frightened by these individuals actions, Richard ran out onto school grounds. They then chased Richard and, when Richard stopped running, they forcefully grabbed and hurt him as they took him back to the school.

To cover-up their actions, after Richard's father called the Police, they made up a story that Richard was "on or near the Long Island Expressway service road." Mr. Palmadesso testified that Respondent's lawyers helped him draft the suspension letter. Why did Respondent need its lawyers to draft the letter of suspension? If Richard was "on" the service road, why didn't the suspension letter state that? The reason is that Richard was never "on" the service road. His own testimony indicates that he was on school grounds.

"Near" could be anywhere since the school is near the service road. Respondent needed some reason to seek the injunction. Richard was not on the Long Island Expressway service road, but they needed to say that to claim Richard was a danger to himself. It is clear from the facts, Richard was never on the Long Island Expressway service road, but instead he was inside school grounds.

Commissioner Mills expunged this suspension from the record, however, Respondent repeats its fictitious claims. By law, expunged records must be stricken from the record and not used against Richard in any way.

Richard never carried a weapon to school, hit anyone in school or used drugs or alcohol. It has never been established that Richard ever was or will be a substantial danger to himself or others. His only "transgression" was the fact that his parents exercised their due process rights and Respondent, through intimidation and vindictiveness, punished Richard. This is in direct violation of IDEA Law with respect to parents' rights. Richard has become the real victim. He is isolated from his friends, traumatized and stigmatized. The New York State Courts determinations compel Richard to stay at home and receive only ten (10) hours per week of tutoring. The Court can take official notice that there are many students throughout the Nation who are in school at the present time with records far more worse than Richard's. The Court must stop school districts' indiscriminately using injunctive relief to abridge due process laws of the IDEA. Richard simply did not fall within the narrow exception that this Court carved in *Honig v. Doe*, 484 U.S. 305 (1988).

Petitioners possess documents and doctor's reports substantiating their position. Upon this Court's review of this matter, petitioners will supply the Court with copies of these documents.

CONCLUSION

Therefore, it is respectfully requested that this Court reject any arguments advanced by Respondent and, instead, grant the requested Petition.

Respectfully submitted,

WOLIN & WOLIN, ESQS.

By: Alan E. Wolin, Esq.
Attorney for Petitioners
420 Jericho Turnpike, #215
Jericho, New York 11753
Telephone: (516) 938-1199
Facsimile: (516) 938-1178